



Research Article

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Some Reflections on the Constitutional Review in Albania in a Comparison Key

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Abstract

In this study we will try to analyze the foundations of the Constitution as a pillar and as a guarantee for its solidity. The study will also address the need for revision of the constitution as a fundamental element of its existence and continuity. Particular emphasis will be given to the comparison of the constitutions of the most important countries in the world as regards the procedures and limits to the constitutional revision. In this sense, the constitutions of some Balkan Peninsula countries will be analyzed to draw a comparison and analyze the Albanian Constitution as regards the procedure for its revision. The study intends to analyze the procedures for the revision of the Constitution as well as the explicit and implicit limits to these revisions. In the Constitutional revision in Albania in 2016, the role of the Constitutional Court on the control of the constitutional legitimacy of constitutional revision laws was clarified. Formal constitutionality is usually emphasized since the Albanian constitutional reform underlined that the Constitutional Court in Albania could express itself on the constitutionality of the Constitutional revision law only from a formal point of view.

Keywords: Constitution, constitutional revision, limits to constitutional revision, constitutional revision procedures, core of the Constitution

1. Introduction

The Constitution is the fundamental law of the state, which means that the entire state building and the remaining part of its legal system are based and supported on its foundations. Logically, in a metaphorical way, one can think that to have a stable building, the foundations should also be solid and not change. At least they should not change often, as there is a risk that the building itself will lose solidity in a way that is equally relevant to changes in the foundations. In this sense, it must be

specified that the Constitution truly founds the state, but it is *per se* founded on the will of the sovereign people, which makes it a pillar of state organization.

Returning to the metaphor of the building, it could be said that the State Constitution in general must project solidity, and this solidity needs to be consolidated and this can only happen over the time and course of its life. This does not mean that the Constitution is immutable since being a social pact it is natural that this pact can be revised according to the procedures contained therein.

In fact, all constitutions provide for procedures to be revised, some rigid and some less rigid, while most constitutions provide for intermediate measures. The difference in the procedures for revising the Constitution "depends on the interaction of various factors - social, cultural, historical, political-party, economic - as well as on the constitutional traditions of each country" (Piergigli 2016). In short, the constitutions, regardless of the rules for their revision, were born to be modified, but "the power of constitutional revision cannot touch upon the heart and essence of the constitution; if it did, it would be the exercise of constituent power and one could no longer speak of constituted power" (Morbidegli 2016). In fact, it should be emphasized that "even with some forcing, it was therefore rightly emphasized that the constitutional revision procedure constitutes the most important part of a Constitution" (J. W. Burgess)" (Pace 2016).

The Constitution is not a text that can be put aside, rather its content must form a parallel with the popular will. In this sense, it becomes necessary to highlight that the primary objective that the constitutional papers constitute is self-preservation; rather, it could be said that the perspective that the constitutions embrace is not that of static but that of dynamics (Pia Iadicicco 2019). The dynamism of the Constitution must correspond to the evolution of society to respect the social pact it represents.

Without explicitly modifying the constitutional text, there are tacit modifications, "which must be identified as the possible vehicles for change: conventions, customs, constitutional jurisprudence or ordinary judges" (Bartole 2019). "The amendments could implicitly abrogate, integrate, tacitly contradict specific constitutional provisions; tacit modifications, however, would also be the legislative omissions found in the constitutional implementation" (Morrone 2018).

In this sense it should be pointed out that the limits to the constitutional revision must take into account the supreme principles of the constitution which represent an insuperable confine (Nania 2016).

In this logic, the jurisprudence of the Italian Constitutional Court deserves emphasis. Despite article 139 of the Italian Constitution provided for an explicit limit which will be dealt with below, the Constitutional Court declared via the 1988 ruling that "the supreme principles of the constitutional order" have "a higher value than other norms or laws of constitutional level" (Constitutional Court it. 1146/1988).

2. Some Comparative Considerations on the Procedures for Revising the Constitution and Its Limitations

First of all, taking into consideration some Constitutions as regards the provisions of the procedure for their revision, deserves particular attention at this point.

In this sense, we should start with the United States Constitution which is the "oldest" of those taken into consideration through this analysis. This constitution as well as being the most long-lasting one, despite its various amendments, is at the same time the most rigid to be revised (Venice Commission 2015). The United States Constitution in Article V provides that Congress can adopt changes to the Constitution. It is also worth noting that the United States is a federal state and from this point of view the member states composing it also play a great role in controlling the revision.

In federal states such as the United States, "the federal essence of the political-constitutional system is expressed in the formulas of constitutional revision" (Groppi 2002). Regardless of the fact that it is not explicitly provided for in Article V, "the United State Constitution is a far more majority

and populist document than is commonly believed, and that the People of the United States have a legal right to change the government. - to amend the Constitution - through a majority and populist mechanism similar to a national referendum" (Vespaziani 2012).

The fundamental law of Germany in Article 79 deals with the procedure for amending the Constitution and the explicit limits to this revision. In the article 79 (3) explicitly provides for the limits to the revision of the German fundamental law which gives fundamental importance to the *Länder* in this process and which mainly concerns the fundamental rights provided for by this law.

Article 89 of the French Constitution provides for the revision procedure and the limits to the constitutional revision. In the latest paragraph of Article 89 of the French Constitution, the explicit limit is placed on the Constitutional revision. This limit concerns the Republican form of government in France which cannot be subject to constitutional revision in the same way as Article 139 of the Italian Constitution provides.

The Spanish Constitution can now be considered as the "*pacto de convivencia* of the Spaniards, of all Spaniards" (Frosina 2018) and affirmed the democratic form after forty years of dictatorship. Since the entry into force of the Constitution, Spain has achieved significant results also in relation to other European countries, such as a stable, institutional, political system etc. (Frosina 2018). Before this Constitution, Spain had lived through various constitutional texts that gave light to this evolution, which oscillates from one extreme to the other, between progressivism and conservatism, between conquests and reaction, between democracy and its denial that at home and abroad has acquired historiographical credit of the thesis of a "pendular Spain" (L. Blanco Valdés 2017).

The Spanish Constitution deals with the subject of constitutional revision in the tenth title. The procedure is exhausted starting from the initiative which must comply with paragraph 1 and paragraph 2 of article 87, according to the provisions of article 166 of the Constitution. Instead, as regards the procedure, it is necessary to refer to Article 167 and Article 168 of the Spanish Constitution. Article 169 of the Spanish Constitution places limits on the revision in the event the country is in a state of war or in any extraordinary situation of the state of emergency as set out by Article 116. Article 169 of the Spanish Constitution seems to have inspired article 177 of the Albanian Constitution as it sees the only limit to the constitutional revision, the states of emergency, whatever the case may be.

The Italian Constitution deals with the subject of constitutional revision in article 138 and its explicit limits in article 139. As regards the provisions of article 138, it must be emphasized that the procedure for the revision of the Constitution must pass between two second votes with a two-thirds majority to avoid a popular referendum. The latter serves "as a sophisticated balance: where a qualified majority of two thirds is not reached in the second resolution, there is the possibility of compensating, of rebalancing the balance upon the intervention - even if possible - of the people through the referendum" (Bellodi 2015).

On the other hand, as regards the limits to the revision, Article 139 of the Constitution which refers to the republican form of the state, states that it cannot be revised as required by article 138. In fact, "the institutional form chosen by the majority of the electoral body already posed itself as a limit to the constituent power" (Apostoli 2018), such as to make the republican form of the state untouchable as enshrined in Article 139 of the constitution. In this way we can say that the results of the referendum that took place on the form of state before the entry into force of the Constitution determined its drafting. The referendum on the form of state had already dictated the constituent power for the drafting of the Constitution, and therefore the popular will "was the creative act of the new republican form of state" (Contini 1971).

Let's approach the subject after having considered the articles of the constitutions of some of the most important countries in the world. Specifically, in this sense with regard to the core of the study, the articles of the constitutions that deal with the procedure for the revision of the Constitution and the explicit limits provided for it.

It is now convenient to enter the Balkan area where Albania is part to narrow the comparison with the constitutions of neighboring countries and to see how many points of contact or similarities

can be found.

It would be better to start with Greece, since it would be the Balkan country that first adapted or approached the system of Western countries. Article 110 of the Greek Constitution deals with the issue of the Constitutional revision and establishes the explicit limits to amendments of the constitutional provisions. These limits first of all concern the form of state which must be that of the parliamentary republic. Furthermore, Article 110 lists the explicit limits on the revision of the Greek Constitution.

The Constitution of the Republic of North Macedonia, on the other hand, deals with the subject of the Constitutional revision in its article 131 which highlights the procedure of the initiative and approval of the constitutional amendment, and does not provide for explicit limits to these revisions.

The Constitution of Kosovo which is the newest in the region and deals with the subject of the Constitutional revision in a way that guarantees respect for human rights through a prior assessment by the Constitutional Court. Article 144 of the Kosovo Constitution establishes the procedure, how the revision must be conducted and the role of the Constitutional Court which must express itself *ex ante* if the revision respects the rights and freedoms provided for therein. This ensures that the rights and freedoms provided for by the Kosovo Constitution do not diminish.

3. The Constitutional Provisions for the Revision of the Constitution in Albania and an Analysis of this Process

Article 177 of the Albanian Constitution provides that the constitution is subject to revision and outlines the entire procedure in this regard. There have been not a few initiatives for the revision of the Constitution in Albania since its approval in 1998. In fact, in 1998 the Constitution, in addition to being approved by parliament, had also popular confirmation through the confirmatory referendum in November of that year.

The Albanian Constitution entered into force in 1998, after the transition that had boosted up the law for the main constitutional provisions. Since the early '90s, Albania had abandoned the communist system to follow all the central and eastern European states towards a new system of pluralist democracy.

Since 1998, the Albanian Constitution has seen several interventions proper, so much as to believe that that fundamental law has lost a lot from its identity. In this sense, it is necessary to refer only to the formal revisions of the Constitution and not to the suspensions or constitutional infringements, i.e. the non-formal revisions of the Albanian Constitution (Hoxhaj-Bianku 2013).

Of all the Constitutional revisions made to the Albanian Constitution, the most significant was made in 2016, the one concerning the reform of the justice system in Albania. The 2016 constitutional revision law, in addition to having reformed the entire constitutional legislation on the justice system, introduced the second paragraph in Article 131 of the Albanian Constitution. The second paragraph¹ of article 131 acknowledges the extension of the Constitutional Court competence for the control of the constitutionality of the constitutional revision law, when the procedure for the adoption of this law has not been complied with (Sadushi, 2019).

With this reform, the parliament clarified the question of constitutional reviewability of the constitutional revision laws at least from a substantive point of view. In this sense, the constitutional revision laws could be subject to review by the justice of the laws, only as regards the formal rules of the approval procedure as provided for by the Albanian Constitution.

However, in the first years of the existence of the Constitutional Court in Albania, the latter controlled the constitutionality of a Constitutional amendment, but in this case, more than a control on constitutionality seems to be the result of an arduous conflict between the Constitutional Court

¹ Article 131 paragraph 2 of the Constitution of the Republic of Albania: "The Constitutional Court, in the event that it must rule on the constitutionality of a constitutional revision law, approved by the parliament pursuant to article 177, checks only the observance of the procedure provided for by the Constitution."

and the Parliament (Sadushi 2012).

Indeed, in this case the constitutional revision law concerned the Constitutional Court itself, and more precisely the renewal of its members (Mërkuri 2015). It could be said that this decision of the Albanian Constitutional Court is based heavily on the limited experience of this institution. Since its first years of the existence of the Constitutional Court, it had gone even further than the provisional constitution for its competence as a “negative” legislator by changing a paragraph of the Albanian Civil Code (Omari 2014). In addition, it must be specified that Article 25 of the law that established it (Law no. 7561/92) provided that the Constitutional Court also acted on its own initiative for the control of constitutionality.

In any case, although the Albanian Parliament has introduced paragraph 2 to Article 131 of the Constitution on the legitimacy of the Constitutional Court regarding constitutional revision laws, they should be in accordance with the core of the Constitution.

The Albanian Constitution is preceded by a preamble which stands as a source for its articles, which must be inspired by it and in no case can oppose it. In short, the preamble for the Constitution “sets out the reasons that guide the action of the constituent power, as well as the objectives or ends that it pursues with its action” (J. Tajadura 2003).

The preamble of the Albanian Constitution lists some principles that guide the formulation of the articles thereof. In the context of this study it is important to recall the principles proclaimed in the text of the preamble: “*We, (...) With the determination to build a democratic and social rule of law, in order to guarantee fundamental human rights and freedoms, of tolerance and religious coexistence, with the commitment to the protection of human dignity and personality, as well as to the prosperity of the entire nation, to peace, general well-being, culture and social solidarity, (...) in the profound conviction that justice, peace, harmony and collaboration between nations are the highest values of humanity.*”

In this sense, all those articles of the Albanian Constitution that detail the preamble more specifically should represent the core of the Constitution itself. A natural question arises in this topic which concerns more than anything else the fact that how far the legislative power can go for the approval of the constitutional revision laws. The power of parliament over the revision of the constitution should be limited without there being another constitutional body to express itself in this sense.

Although the Albanian Constitution has now established the role of the Constitutional Court on the constitutional revision laws, it is and should be the duty of the parliament to adhere to and abide by the principles enshrined in the preamble which is the door to the constitution. Several articles of the Albanian Constitution can be highlighted which cannot be modified and which constitute the core of the Constitution (Mërkuri 2015), the identity element thereof, and that without them it would be convenient to adopt another Constitution.

From the various constitutional revisions in Albania, two of them concerned the theme of elections, a much-debated issue in Albania since political pluralism has been in force. In this logic, it would probably be a question that would benefit the solidity of the Constitution if it did not deal with the issue of elections in the constitutional charter. If it is presented that electoral reform is a crucial point of the political crises in Albania that fuels discussions and debates among political forces, to the point that it could be said that this topic should be dealt with marginally to the Constitution, and not in a detailed way. This because, even when it was envisaged in the Constitution, the electoral system was not directly implemented, but was implemented by the electoral law (Bogdani 2015).

The inclusion of paragraph 2 of article 131 in the Albanian Constitution may seem a limit set by the legislator for the Constitutional Court on the control of the constitutional legitimacy of the revision laws. The implicit limits to the constitutional revision must first of all be addressed to parliament, since this is the institution that represents popular sovereignty. If we consider the Constitution as a social pact, it could be said that no constitutional body can undermine this pact. In this sense, neither the legislator who is granted the opportunity to undertake the process of revising the Constitution nor the institution that has to control this initiative, in short, neither the legislator

nor the negative legislator is defined as the Constitutional Court.

The paragraph 2 of article 131 may seem like a problem for the duration of the Albanian Constitution, but in all constitutional revisions in no case has it turned to the Constitutional Court for control of a Constitutional revision law. This because the approval of the Constitutional revision laws had a very large majority which left no misunderstanding for compliance with the so-called social pact.

The latest Constitutional revision in Albania was approved on 30.07.2020 by Law 115 of 2020 and concerned the electoral system. The approval of this law on the last day of the parliamentary session would not entail any constitutionality problems were it not for the day on which the proposal for this constitutional amendment was launched. This, both due to the fact that the proposal was signed at a phase of the extraordinary state of the natural disaster and to the fact that from the proposal to the approval, a little more than a month passed.

The parliament signatories of the initiative referring to Article 177², bearing in mind the unconstitutionality of the initiative, asked the parliament to take it into consideration after the extraordinary period of the state of natural disaster has ended. On the other hand, the time, albeit constitutional according to the parliament's rules, can be considered short if one bears in mind that the reform must be widely deliberated before its approval so that it reflects the popular will that is the source of the Constitution itself.

It has been mentioned above in this study that there are limits to the Constitutional revision which concern the fundamental principles of the constitution or its essential core. In Albania in 2015 through the constitutional revision law intervention was made in the part of the fundamental principles³. In this case, it could be said that the constitutional revision was conditioned by the Albanian political reality which represented the popular will. Also, in this case, albeit indirectly, the constitutional revision law concerned the issue of elections.

For this reason, the constitutional revision law had the support of political forces and had an undisputed majority to support this change. Furthermore, it could be said that this constitutional reform seems to have gone in line with the silent popular support who saw the values that founded the Constitution to be overwhelmed.

4. Conclusion

This study comparatively analyzed the constitution and its limitations to revision. The value of the Constitution is evident when it comes to the limits to its revision but also when it comes to its need for revision. This would be achieved by keeping the two needs in balance, that is, the revision and its limits, so as not to trample the core of the Constitution. Achieving and maintaining this balance should be the duty of constitutional institutions in a way that reflects the will of the people. Limits to constitutional revision must exist even when there is a majority required for constitutional revision, when it comes to essential elements of the Constitution. These limits, both when they are explicit but especially when they are implicit, must comply with the foundations of the Constitution.

Through this study, an attempt was made to take into consideration different constitutions with regard to their constitutional revision procedures. As a result, several constitutions have set explicit limits on their revision. It also appears that for constitutional revisions, alongside the explicit limits, the implicit limits and those concerning the door of the Constitution are linked. These are the values that founded it, and which represent the essential elements of their existence in all constitutions and

² Available in Albanian at the page, <https://www.parlament.al/Files/ProjektLigje/20200622122459ndryshimet%20kushetuese%202020.pdf>, access date: 08/31/2020.

³ Article 6/1 of the Constitution of the Republic of Albania, added by law no. 137/2015, dated 17.12.2015 "The election, appointment or exercise of a public office in one of the bodies provided for in this Constitution, or established by law, is prohibited, notwithstanding the provisions made in other provisions of this Constitution, if circumstances that violate the integrity of the public official are verified, according to the conditions. and rules laid down by law adopted by three-fifths of all members of the Assembly."

which are part of all the constitutions taken into consideration in this study.

In this logic, the comparison is necessary in highlighting the essential values of the Constitution, since for the other limits regarding the revision of the constitution those are explicitly unavailable in the Albanian Constitution. Those limits can only be found through a constitutional comparison and above all constitutional justice. In this way the articles of various constitutions concerning the constitutional revision procedure were analyzed. In particular, the provision of the explicit limits envisaged by some constitutions was of great importance. The same applies to the implicit limits which represent the identity of the constitutional charter and if not respected, it seems that they totally transform it so much that they lose their identity.

A particularly important attention was paid to the fact that in the reform of the justice system in Albania in 2016 the Albanian parliament introduced a possibility for the reviewability of the constitutional revision laws by the Constitutional Court. This possibility concerns only the formal reviewability of any constitutional revision initiative. Hence, the constitutional revision laws in Albania since the entry into force of the Constitution in 1998 were analyzed.

In any case, it could be said that the revisions to the Constitution should take into consideration the fundamental principles that are considered sacred for the constitution which represent its identity and are its pillar. These values in the Albanian Constitution seem to derive from its preamble which represents the source of the Constitution itself and which places limits on the constitutional revision. These limits are reflected by the preamble in the articles that detail it, and it seems that they are the implicit limits of the Albanian Constitution, such as to oblige Parliament not to touch upon them in case of possible constitutional revision. Although the Constitutional Court cannot substantially review the constitutional revision laws, nothing prevents it from expressing those fundamental values of the Constitution by referring to other constitutional courts.

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